Office - Supreme Court
FILED
APR 30 195
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

JOHN H. BRILL

1020 Mills Building
220 Montgomery Street
San Francisco 4, California

Counsel for Petitioner

INDEX

Cases Cited

	PAGE
Sterrett v. United States 9th Cir., 1954, 216 F. 2d 659	3

Statutes and Regulations Cited

Selective Service Regulations (32 C. F. R. Supp. § 601.5 *et seq.*) (1940 act) —Section—	
625.1	3
625.2	3
652.11	3
United States Code, Title 50 Appendix §§ 301-318 (Selective Training and Service Act of 1940), Section 5(g)	2, 3
§ 456(j) (Universal Military Training and Service Act)	2, 3

Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

Now comes the petitioner and submits to the Court his Supplemental Brief in support of his petition for writ of certiorari.

At the time the petition for writ of certiorari was prepared petitioner overlooked one important point that should have been included in the petition as a reason for granting the writ. This Supplemental Brief supports subdivison 1 under Reasons for Granting the Writ, on pages 6 and 7 of the petition.

The courts below take the position in their opinions that Congress did not intend to limit the performance of civilian work to a federal agency. The courts below ignore completely the fact that the provisions of the Universal Military Training and Service Act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) requiring performance of civilian work by a conscientious objector, are almost the same as the provisions of the Selective Training and Service Act of 1940 (50 U. S. C. App. §§ 301-318, 54 Stat. 885) for the performance of civilian work by conscientious objectors.

The 1940 law was never construed, applied or interpreted to authorize state or private employment of conscientious objectors. The interpretation of the 1940 law was outstanding for over ten years when the Universal Military Training and Service Act was adopted. The passage of the Universal Military Training and Service Act constituted a re-enactment of the old provisions in the 1940 law about the work to be done by conscientious objectors.

When Congress passed the Universal Military Training and Service Act, re-enacting the old law, Congress thereby approved the administrative interpretation placed upon the 1940 law, which restricted the performance of civilian work by conscientious objectors to federal agencies. The adoption of this administrative interpretation constituted a legislative limitation of the performance of civilian work by conscientious objectors to service only for the federal government or agencies of the federal government. It shows a congressional intent not to allow an extension of the service by conscientious objectors in state or private agencies.

The 1940 law (50 U. S. C. App. §§ 301-318, 54 Stat. 885) in Section 5(g)provided, among other things, as follows:

> "... Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted ... be assigned to noncombatant service ... or

> . . . if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. . . ."

Sections 652.1, 652.2 and 652.11 of the Selective Service Regulations under the 1940 law provided for the performance of such work in civilian public service camps operated by the Director of Selective Service.

The provisions of the present law (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) are for the performance of the same kind of work as Congress provided for under the 1940 law. Because of remarks on the floor of Congress by members of the House and Senate that it was intended that the government not operate civilian public service camps, the regulations under the present law did not provide for the maintenance of such camps. The conscientious objector by regulations was made liable for the performance of civilian work in governmental and state agencies.

The Selective Service Regulations interpreting the 1940 law were an outstanding administrative interpretation showing congressional intent when the present law was enacted to confine the civilian work to federal employment, as was the case under the 1940 law. Nothing was said on the floor of Congress, or in the law itself, that authorized state or private employment of conscientious objectors under the law. The outstanding interpretation by officials charged with the administration of the 1940 law, substantially the same as the present law, should be followed. The interpretation of the law requiring federal employment rather than state or private employment received congressional approval when substantially the same provisions of the old law were enacted into the present law without change.

In *Sterrett* v. *United States*, 9th Cir., 1954, 216 F. 2d 659, the court said:

> "Such had been the interpretation of this provision of the Act of Congress for a period of approximately twelve years. Such interpretations by those charged with the Act's administration are entitled to persuasive weight. *Billings* v. *Truesdell,* 321 U. S. 542, 552; *United States* v. *Alabama Railroad Co.,* 142 U. S. 615, 621; *Luckenbach SS Co.* v. *United States,* 280 U. S. 173, 181; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757. In other words, the construction of the Act for which the appellants here argue is the same construction which the officers charged with its administration had placed upon it for this considerable period of time.
>
> There is a further reason why we think we must thus construe the Act. When Congress substantially reenacted the provisions of the 1940 Act, the Administrative Regulations thus interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval. It has been said that in similar cases the Regulations have the effect of law. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *United States* v. *Zazove,* 334 U. S. 602, 623; *Hartley* v. *Commissioner,* 295 U. S. 216, 220."

It is respectfully submitted that this rule should be applied here, to outlaw state or private employment by conscientious objectors under the act authorized by the present regulations.

The Court should not find any broader congressional intent for the employment of conscientious objectors under the law than Congress authorized for members of the armed forces. Soldiers were not intended to be farmed out for service of the state governments. There is nothing in the act to indicate that it was intended that conscientious objectors should be farmed out to state or private agencies for service. If a soldier cannot be lawfully transferred to

the state government to act as an employee in a state hospital under the law, then by force of the same reason a conscientious objector cannot be ordered to do similiar service in state or private hospitals, in the absence of a specific provision in the act itself commanding such service.

Here the courts below have taken the statute and read into it something that is not fairly intended by Congress to be the law. The courts must interpret, not make, the law. Judicial legislation of the character contended by the courts below is not permitted.

For the reasons stated in the petition for writ of certiorari and in this supplemental brief the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

JOHN H. BRILL

1020 Mills Building
220 Montgomery Street
San Francisco 4, California

Counsel for Petitioner

April, 1955.